of this argument that the Court had power to grant that Order.

A Third Party Notice may be served out of the jurisdiction provided that the subject matter of the claim in respect of which that Notice is issued falls within one or other of the clauses contained in Order 11 rule 1 of the Rules of the Supreme Court which deals with service out of the jurisdiction. It is quite clear and is indeed conceded, that the only clause applicable in this case is Order 11 rule 1(h) which enables service out of jurisdiction wherever "any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction".

Before, therefore, there can be service out of jurisdiction it must be shown that the person to be served :—

(1) Is a necessary or proper party to an action properly brought against some other person; and
(2) Such other person must have been duly served within the jurisdiction.

Now what had to be considered is not an action brought by the plaintiff against the defendant, but the subsidiary action brought by the defendant, the present respondent, against the Third Parties (the appellant and the co-trustee) for contribution or indemnity. The position is clearly stated in the case of *McCheane v. Gyles*[1]. We cannot do better than quote the words of Romer L.J. in the course of his judgment, at page 300, in which he says :—

"What we have to consider in this case is, 'Is this third party notice, were it in form a writ of summons, capable of being served out of the jurisdiction upon a third party?' In considering that question one must have regard to the parties, that is, not to the claim of the plaintiff in the action, but to the claim of the defendant against the third party. You must treat the claim of the defendant against the third party as if it were a claim on a writ of summons, and see if that claim comes within the rules as to the service of writs out of the jurisdiction, that is, within Order XI, r. 1. If it does, then leave can be given for the service; if not, leave cannot be given. In my opinion, it is plain here that there is no case for giving leave, because the case cannot be brought within one of the provisions of Order XI, r. 1. For the purpose of considering whether service of a third party notice out of the jurisdiction should be allowed, you have nothing to do with the subject-matter of the claim in the action itself: you can only look at the nature of the claim made by the notice and the position of the person who is sought to be served. The rules are really plain, and the matter is, in my opinion, free from doubt."

In this case the claim for contribution is solely against the parties in India. There was, therefore, no "action properly brought against some other person duly served within the jurisdiction." In our view, therefore, leave ought not to have been granted to serve the appellant and the other Third Party out of the jurisdiction.

Nor do we consider the position has been affected by the appellant having entered an unconditional appearance and therefore can be said to have submitted to the jurisdiction of the Court. Before leave could properly be granted for service out of jurisdiction it was an essential pre-requisite that an action should have been properly brought against some person duly served within the jurisdiction. The words "properly brought" fell to be considered by the House of Lords in the case of *John Russell & Co. Ltd. v. Cayser, Irvine & Co. Ltd.*[20]. In that case Their Lordships held that the words "properly brought" clearly enure to the protection of the person out of the jurisdiction whom it is proposed to serve with the process. Lord Wrenbury in the course of his judgment, at page 306, stated :—

"'Properly brought' in this rule means, I think, or at any rate includes, brought with a due observance of the process of the Court against a person who could properly be served with the process of the Court, and not because he chooses voluntarily to submit himself to the jurisdiction of the Court. That has not happened here. The exact question for determination is this: Can one defendant by consent by submitting to the jurisdiction confer jurisdiction as against another defendant? My Lords, in my opinion he cannot. I think the action mentioned in Order XI, rule 1(g), as one 'properly brought' means an action brought by a plaintiff against a defendant by virtue of the user of the process of the Court — not by user of the process with the addition of a voluntary submission by the defendant to the jurisdiction of the Court."

In our view, therefore, the service out of the jurisdiction was not a mere irregularity that could be cured by entry of appearance : it was a nullity which went to the root of the matter and, on the authorities to which we have earlier referred (*Hilton v. Sutton Steam Laundry*[8] and *Craig v. Kanssen*[9]) the appellant was entitled to have the Order set aside.

On these two grounds alone we were of the opinion that this appeal should be allowed with costs.

Appeal allowed.

Solicitors : *Lim, Lim & Oon; Ong Huck Lim & Co.*

KWONG FOONG & CO.
v. WHANG TAR CHOUNG

[O.C.J. (Wilson J.) September 16, 1955]

[K. L. — Originating Motion No. 3 of 1955]

Trade Marks — Application for registration — Application opposed — Onus on opponent to satisfy that the application ought to be refused — Material date to be determined.

This was an appeal against the refusal of the Registrar of Trade Marks to register a trade mark in respect of edible oils made by the applicant. The application was dated June 9, 1952 and was published in the Gazette on June 17, 1954. Opposition to the registration of the trade mark was made by the respondents who, at some date subsequent to the application, and prior to the hearing thereof, had in fact lodged an application for registration of a similar trade mark in respect of edible oils. The Registrar found that the trade marks were almost identical and held that the onus was on

the applicant to satisfy him that his mark should be registered, and found on the evidence that this he had failed to do.

Held: (1) it was for the opponent to satisfy the Registrar that the application ought to be refused. In this case the Registrar had approached the consideration of this matter from an entirely wrong angle;

(2) the material date upon which the state of affairs between the parties must be determined was that of the date of the application, in this case, June 9, 1952.

Case referred to:—

(1) *Ladislas Jellinek* 63 R.P.C. 59.

TRADE MARK APPEAL.

J. S. H. Skirne for the applicant.

J. G. Bentley for the respondent.

Wilson J.: — This is an appeal against the decision of the Registrar of Trade Marks, refusing to register a trade mark in respect of edible oils made by certain individuals trading as Kwong Foong & Co., application for which was dated 9th June, 1952. This application was advertised in the Federation of Malaya Government Gazette on the 17th June, 1954. The evidence before the Registrar of Trade Marks was taken as provided by the Ordinance by way of statutory declarations. Opposition to the registration of this trade mark was made by Whang Tar Choung, trading as Lam Soon Cannery Company, by a notice dated the 13th August, 1954, on the grounds set out in the judgment of the Registrar of Trade Marks. At some date, subsequent to the application of Kwong Foong & Co., and prior to the hearing of the application, it would appear that an application had in fact been lodged by the opponent for registration of a similar trade mark in respect of edible oils. In this respect the Registrar of Trade Marks found that the trade marks were very much alike — in fact, almost identical — and that the user of these two marks by different persons, upon goods of a like kind, would undoubtedly be likely to cause confusion. The Registrar of Trade Marks held that the onus was upon the applicant to satisfy him that his mark should be registered, and he found on the evidence that this he had failed to do.

In my view it was for the opponents to satisfy the Registrar that the application ought to be refused, and that the Registrar has approached the consideration of this matter from an entirely wrong angle.

It has been suggested that there was a paucity of evidence on both sides and that it might be considered desirable the case should be remitted to the Registrar for re-consideration and for the proceedings with new statutory declarations to be commenced *ab initio*. With this suggestion I am unable to agree. In the first place I do not think I have any power to remit the case, and in the second place, if the onus was upon the opponent — as I hold that it was — then the opponents are entirely to blame if their case was not adequately put before the Registrar, and they should not have a further opportunity of covering up any mistakes made in the presentation of their case. That they did not instruct their solicitors until the last moment has no bearing on the matter.

It seems to me quite clear from the observations of Romer J. in the matter of an application by *Ladislas Jellinek*[1] for the registration of a trade mark, that the material date upon which the state of affairs between the parties must be determined is that of the date of the application, in other words, the 9th June, 1952. I agree with Mr. Bentley that notice of opposition could not have been given until the application had been published in the Gazette on the 17th June, 1954. This appears to me to be immaterial. The statutory declarations filed on behalf of the opponents in October, 1954 could well have referred to the state of affairs as at the 9th June, 1952, but they did not do so. The statutory declarations cited by Whang Tar Choung and Long Heng Peng relate to the state of affairs at the time of these declarations. It is true that Long Heng Peng stated that he had been the selling agent in Malacca and neighbouring districts for edible oil "knife brand" of Lam Soon Cannery Company. He stated that the average sale through his agency was (that is at the date of the declaration) $40,000 a year. He also stated that he had been handling the sale of edible oil in the Federation of Malaya for many years, but he did not say that he had been handling the sale of edible oil "knife brand" of Lam Soon Cannery Company for many years.

In my view, the opponents failed to show a statement of affairs on the 9th June, 1952 which entitled them to object to the registration of this trade mark by Kwong Foong and Company.

The appeal will be allowed with costs and the Registrar of Trade Marks will be directed that the application of Kwong Foong & Co., should be allowed.

Appeal allowed.

Solicitors: *Bannon & Bailey; Shearn Delamore & Co.*